

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

**CHRISTIE BOWERS,**

**Plaintiff,**

**vs.**

**ROBIN KLETKE and ROBIN COHEN,  
husband and wife and the marital  
community composed thereof,**

**Defendants.**

**NO. C08-1768RSM**

**PLAINTIFF'S MOTION  
FOR LEAVE TO FILE FIRST  
AMENDED COMPLAINT**

**NOTED ON MOTION DOCKET:  
MAY 28, 2010**

**I. Introduction and Statement**

Plaintiff brings this Motion for Leave to File First Amended Complaint pursuant to Federal Rule of Civil Procedure 15. A copy of the original complaint is attached as **Exhibit 1**, a copy of a "track changes" version that shows the proposed amendments more clearly is attached to the Walters Declaration in Support of Plaintiff's Motion for Leave to File First Amended Complaint as **Exhibit 2**, and a clean copy of the proposed First Amended Complaint is attached as **Exhibit 3**. (Walters Decl. ¶ 3).

The proposed amendments are clarifying amendments that accomplish three things: First, they clarify that Plaintiff's claims arise under both Title I and Title II of the Electronic

1 Communications Privacy Act ("ECPA"). (See **Exhibit 2** at ¶¶ 2.3, 4.2, 4.3 and B and C of  
 2 the Prayer for Relief). Second, they clarify that Plaintiff is not alleging that the defendants  
 3 viewed exactly 139 emails. (See **Exhibit 2** at ¶ 3.73). And third, they clarify Plaintiff's state  
 4 statutory claim by including language from the statute RCW 9.73.030 and its civil remedy  
 5 counterpart RCW 9.73.060. (See **Exhibit 2** at ¶ ¶ 5.2 and B and C of the Prayer for Relief).

6 These amendments are sought because the defendants are now *pro se* and may not  
 7 understand the liberal notice pleading standards or that FRCP 15(b) allows a party to move  
 8 to amend the complaint at any time to conform to the evidence, even after trial.  
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10 Counsel for Plaintiff provided a a similar draft of the "track changes" version of the  
 11 proposed First Amended Complaint (see **Exhibit 2**) and asked for their consent, but the  
 12 defendants declined. (Walters Decl. ¶ 3). Therefore, Plaintiff brings this motion asking for  
 13 leave to file the First Amended Complaint. Pursuant to FRCP 15, Plaintiff respectfully  
 14 requests that the court grant leave to file the First Amended Complaint.  
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## 16 **II. Evidence Relied Upon**

17 This Motion for Leave to Amend is supported by the Declaration of Mark Walters in  
 18 Support of Plaintiff's Motion for Leave to File First Amended Complaint ("Walters Decl.")  
 19 with attached exhibits and the records and files herein.  
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## 21 **III. Authority & Argument**

22 At this stage of the case, FRCP 15(a)(2) provides that a party may amend its pleading  
 23 only by leave of the court or by written consent of the adverse party. See *id.* In this case,  
 24 the defendants did not consent to the proposed amendments. (Walters Decl. ¶ 3).

25 The granting of a motion for leave to amend falls within the sound discretion of the  
 26 district court. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996), and the court

1 must heed Rule 15's mandate that leave is to be "freely given when justice so requires." *Id.*;  
 2 see *also* Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1083  
 3 (D.C. Cir. 1998). Indeed, "[i]f the underlying facts or circumstances relied upon by a Plaintiff  
 4 may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on  
 5 the merits." Foman v. Davis, 371 U.S. 178, 182 (1962).

6 The federal system of notice pleading requires only that the Plaintiff provide "a short  
 7 and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2).  
 8 Here, Plaintiff alleged that the defendants violated the Electronic Communications Privacy  
 9 Act, and the original complaint referenced ECPA Title I as 18 USC, Chapter 119. (See  
 10 **Exhibit 1** and **Exhibit 2**, § IV, ¶ 4.2 and ¶ 4.3). Nevertheless, the original complaint is  
 11 replete with references to unauthorized access to Plaintiff's email account. Indeed, these  
 12 allegations are repeated throughout the original complaint as indicated in the chart below.  
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<b>Allegation of Unauthorized Access in Original Complaint (Exhibit 1)</b>	<b>Paragraph</b>
". . . defendants had been secretly obtaining access to plaintiff's personal emails and email account without her knowledge."	¶ 3.6
". . . Juno records confirmed that the defendants surreptitiously obtained access to plaintiff's personal emails and email account, and had intercepted and viewed 139 emails without plaintiff's knowledge. "	¶ 3.7
"After conducting an independent investigation, Kathryn Surace-Smith, Vice President and General Counsel of Sonosite confirmed in a February 25, 2008 21 correspondence to Mr. Foster that defendant Robin Kletke accessed plaintiff's email account from the company's servers on several occasions."	¶ 3.9
"On or about February of 2008, plaintiff filed an action against defendant Kletke and Cohen in Pierce County District Court under Cause Number 84613439A seeking to stop defendants from intercepting and viewing her personal emails and email account by obtaining an Order For Protection From Unlawful Civil Harassment. After a February 19, 2008 hearing at which defendant Kletke and his at legal counsel attended, an Order for Protection was entered prohibiting defendant Kletke and defendant Cohen from intercepting, obtaining access, or viewing plaintiff's emails or email account."	¶ 3.10¶

1	"Defendants intentional and repealed unauthorized access to plaintiff's personal email(s) and email account over an extended period of time . . . "	¶ 4.2
2	"Defendants intentional and repeated unauthorized access to plaintiff's email(s) and email account over an extended period of time . . . "	¶ 5.2

3  
4 No prejudice to the defendants results here because the proposed amendment  
5 asserts claims that arose out of the exact same conduct, transactions and occurrences set  
6 out in the original complaint; that the defendants accessed Plaintiff's email account without  
7 her consent or authorization. See FRCP 15(c)(1)(B). To the extent the amendment with  
8 respect to ECPA Title II asserts a new cause of action, this cause of action unquestionably  
9 relates back because the original complaint includes multiple references to unauthorized  
10 access to Plaintiff's [www.juno.com](http://www.juno.com) account. FRCP 15(c)(1)(B). All this proposed  
11 amendment does is clarify to the *pro se* defendants that the Plaintiff has alleged a violation  
12 and right to statutory recovery under ECPA's Title II, also known as the Stored  
13 Communications Act. This ECPA Title II amendment does not change the nature or the  
14 character of this lawsuit because these facts have always been a part of this lawsuit.  
15 Hence, it does not result in prejudice to the defendants. The court should grant leave to file  
16 the First Amended Complaint.  
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19 With respect to the proposed amendment regarding Plaintiff's Washington State  
20 statutory claim, RCW 9.73.030<sup>1</sup>, the proposed amendment clarifies the claim by adding  
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23 <sup>1</sup> RCW 9.73.030 provides:  
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25 (a) Private communication transmitted by telephone, telegraph, radio, or other  
26 device between two or more individuals between points within or without the state by  
any device electronic or otherwise designed to record and/or transmit said  
communication regardless how such device is powered or actuated, without first  
obtaining the consent of all the participants in the communication;

1 language from the statute and the civil remedy provision, RCW 9.73.060.<sup>2</sup> (See **Exhibit 2**  
 2 at ¶ 5.2 and B and C of the Prayer for Relief). This claim has always met the notice  
 3 pleading standards of FRCP 8(a)(2), however, because the defendants are *pro se*, the  
 4 amendment clarifies this claim. Here again, the amendment does not change the nature or  
 5 the character of this lawsuit because these facts and claims have always been in the case.  
 6 As such, it does not result in prejudice to the defendants. The court should grant leave to  
 7 file the First Amended Complaint.  
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9 Finally, with respect to Plaintiff's proposed amendment regarding the "139 emails",  
 10 the proposed amendment merely clarifies that the defendants' alleged access to Plaintiff's  
 11 email account led to the violations of state and federal law. (See **Exhibit 2** at ¶ 3.73).  
 12

13 Plaintiff believes that the original complaint meet the notice pleading standards of  
 14 FRCP 8(a)(2) for this allegation, and the proposed amendment only clarifies the allegation  
 15 and does not change the character or nature of the lawsuit. As before, there is no  
 16 prejudice to the defendants because the allegations of unauthorized access have always  
 17 been in the case.  
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20 (b) Private conversation, by any device electronic or otherwise designed to record or  
 21 transmit such conversation regardless how the device is powered or actuated without  
 first obtaining the consent of all the persons engaged in the communication.

22 <sup>2</sup> RCW 9.73.060 provides:

23 Any person who, directly or by means of a detective agency or any other agent,  
 24 violates the provisions of this chapter shall be subject to legal action for damages, to  
 25 be brought by any other person claiming that a violation of this statute has injured his  
 26 business, his person, or his reputation. A person so injured shall be entitled to actual  
 damages, including mental pain and suffering endured by him on account of violation  
 of the provisions of this chapter, or liquidated damages computed at the rate of one  
 hundred dollars a day for each day of violation, not to exceed one thousand dollars,  
 and a reasonable attorney's fee and other costs of litigation.

1 Plaintiff also brings this motion pursuant to FRCP 15(b)(2) on the grounds that the  
 2 issues sought in the amendment have been litigated by express or implied consent, and  
 3 pursuant to FRCP 15(b)(2), a "party may move — at any time, even after judgment — to  
 4 amend the pleadings to conform them to the evidence. An amendment under Rule 15(b)  
 5 may be allowed only when the opposing party will not be prejudiced. United States v.  
 6 Davis, 261 F.3d 1, 59 (1st Cir. 2001). Again, no prejudice to the defendants results here  
 7 because the "unauthorized access" factual allegations have always been in the case.  
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9 The Title II ECPA claim, the RCW 9.73.030 claim and the unauthorized access  
 10 factual allegations have always been in the case. In addition, the Title II ECPA claim has  
 11 been argued in the briefings without objection. In Kenda Corp. v. Pot O'Gold Money  
 12 Leagues, Inc., 329 F.3d 216, 232 (1st Cir. 2003) (*quoting* FRCP15(b)). When the opposing  
 13 party does not expressly consent to trial of an issue, "[c]onsent to the trial of an issue may  
 14 be implied if, during the trial, a party acquiesces in the introduction of evidence which is  
 15 relevant only to that issue." Id. (internal citations omitted).  
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17 From the very first substantive briefing her new counsel filed in the case, Plaintiff has  
 18 argued that this case includes Title I and Title II violations of the Electronic Communication  
 19 Privacy Act. In her Opposition to the Defendants' Motion for Sanctions, Plaintiff stated:  
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21 The defense calls foul on the plaintiff's failure to identify damages. Even if  
 22 this is true, the failure to explain evidence of damages is not prejudicial in any  
 23 way because the federal statutes involved in this case allow for award of  
 24 preliminary and other equitable relief, statutory penalties, punitive damages  
 25 and reasonable attorneys' fees and other litigation costs incurred. See 18  
 26 U.S.C. § 2520(b)-(c)(1) and (2):

\* \* \* \*

Similar remedies are available under 18 U.S.C. § 2707(b)-(c) for unlawful  
 access to stored communications in violation of 18 U.S.C. § 2701:

(b) Relief. - In a civil action under this section, appropriate relief includes –

(1) **such preliminary and other equitable or declaratory relief as may be appropriate;**

(2) **damages under subsection (c);** and

(3) **a reasonable attorney's fee and other litigation costs reasonably incurred.**

(c) Damages. - The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, **but in no case shall a person entitled to recover receive less than the sum of \$1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.** (Bold emphasis in added in original).

Because these statutes allow for statutory remedies and penalties, it causes no prejudice to the defense for Ms. Bowers to not have explained her damages theory if she in fact has not done so.

(Dkt. # 49 at 12-13). The citations to 18 U.S.C. § 2707 and 18 U.S.C. § 2701 are clear indications that this case includes Title II ECPA claims.

The defendants were represented by counsel at this time and they did not object to this argument as being outside of the pleadings. (See Dkt. 57). Then, in the Court's March 1, 2010 Order Denying the Motion for Sanctions, the court found that "the federal statute Plaintiff is suing under allows for statutory damages. See 18 U.S.C. §§ 2520, 2707." (Dkt # 59). Again, the reference to "2707" is a reference to ECPA's Title II.

Furthermore, in Plaintiff's Corrected Reply to Defendants' Opposition to Plaintiff's Motion to Withdraw Counsel (Dkt. # 76), Ms. Bowers stated in no uncertain terms that the "defendants ignore portions of the Complaint alleging unauthorized access to her online email account." (Dkt. Dkt. # 76 at 2; bold omitted). On page 3 of this Corrected Reply, Ms.

1 Bowers again stated that “it is incorrect for the defendants to suggest that Plaintiff does not  
2 have evidence that they accessed her [www.juno.com](http://www.juno.com) email account without her permission  
3 in violation of the Electronic Communications Privacy Act of 1986. 18 U.S.C. §§ 2701, 2707  
4 and 2720.” (Dkt. Dkt. # 76 at 4). Here again, Plaintiff points to ECPA’s Title II.

5 The Title II ECPA claim has been litigated by the parties. Therefore, the court should  
6 conclude that the claim has been litigated by the consent of the parties and grant this  
7 motion pursuant to FRCP 15(b)(2).  
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#### 9 IV. Conclusion

10 The amendments sought here do not change the character or nature of this case and  
11 cause no prejudice to the defendants. This case is about the defendants’ alleged  
12 unauthorized access, interception, recording, use and disclosure of Plaintiff’s private  
13 electronic communications. These allegations have always been in the case and this  
14 conduct, if proven, will constitute violations of RCW 9.73.030 as well as Title I and Title II of  
15 the ECPA. The defendants are not prejudiced by the proposed amendments; they have  
16 known all along that the Plaintiff’s claims arose out of Plaintiff’s allegations that they  
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1 accessed her private email communications without her consent or authorization.

2 Therefore, Plaintiff respectfully requests that the court grant this Motion for Leave to File

3 First Amended Complaint.

4 Dated this 13<sup>th</sup> day of May 2010.

5 WALTERS LAW FIRM PLLC

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A handwritten signature in blue ink, appearing to read "Mark Walters", is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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Mark Walters, WSBA 25537  
Attorney for Plaintiff, Christie Bowers